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No. 03-9877

In The
Supreme Court of the United States

Jon B. Cutter, *et al.*,
Petitioners,

v.

Reginald Wilkinson, *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For Sixth Circuit

Brief of National Association of Evangelicals and Union of Orthodox Jewish Congregations of America as Amici Curiae in Support of Petitioners

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QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act of 2000, which requires state prison officials who accept federal funds to lift unnecessary governmental burdens from the religious exercise of institutionalized persons under their control.

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INTEREST OF AMICI

The National Association of Evangelicals (NAE) is a nonprofit association of evangelical Christian denominations, local churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 51 denominations, as well as over 250 other religious ministries. NAE serves a constituency of over 20 million people. The Association believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.[1]

The Union of Orthodox Jewish Congregations of America (UOJCA) is the largest Orthodox Jewish umbrella organization in the United States, representing nearly 1,000 synagogues and their members throughout the nation. The UOJCA worked intensely to enact RLUIPA, because of the experience of member congregations with discriminatory zoning and because of concern for Jews confined to prisons and other institutions who need reasonable accommodations such as a kosher diet and Jewish holy day observances.

In the modern regulatory state, exemptions are essential to minority faiths. Orthodox Jews rely almost daily on exemptions to obtain kosher food,[2] to observe the Sabbath and holy days,[3] and to wear religious items with military uniforms, 10 U.S.C. §774 (2000). Our institutions rely on exemptions such as the clergy-penitent privilege and the right to hire employees of our own faith, 42 U.S.C. §2000e-1(a)

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[1] This brief was prepared entirely by counsel for amici. No person other than amici and their counsel made any financial contribution to the preparation or submission of this brief. Petitioners' consent is on file with the Clerk; the consents of Respondents and the United States are submitted with the brief.

[2] *See* 7 U.S.C. §1906 (2000) (exempting ritual slaughter of livestock from the Humane Slaughter Act); *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974) (upholding that exemption).

[3] *See, e.g.*, 42 U.S.C. §2000e-2 (2000); N.Y. Executive Law §296.10 (Supp. 2005) (both providing for workplace accommodations).

(2000). For the sake of our religious liberty and those of all other Americans of diverse faiths, we respectfully submit this brief.

SUMMARY OF ARGUMENT

This brief addresses two related issues. First, Ohio's attack on regulatory exemptions for religious practice is inconsistent with the original understanding. There is much originalist debate about whether the founding generation understood regulatory exemptions to be constitutionally required. But there is no evidence that anyone thought they were constitutionally prohibited or that they were part of an establishment of religion.

Exemptions were never part of the establishment. The established church had no need for exemptions, because its teachings were in accord with government policy. Even nonestablished religions have no need of exemptions if they are large enough to control government policy. Exemptions protect minority religions, and they emerged only as an outgrowth of disestablishment, in the wake of toleration of dissenting worship.

Most exemptions were uncontroversial in the founding era, but exemptions from military conscription produced substantial debate, and claims to exemptions not authorized by the legislature produced litigation. In all this debate and litigation, we have no record of anyone suggesting that exemptions were an establishment of religion.

Congress and the states have enacted thousands of religious exemptions in an unbroken tradition stretching back to the late seventeenth century. This Court has repeatedly, and unanimously, said that such exemptions are generally valid. The original understanding helps explain and confirm both the tradition and the decisions. Exemptions do not support religion in any way that was ever part of an establishment of religion. Properly administered, exemptions are substantively neutral. Of course they are subject to

limits, but those limits must be adjudicated when they arise in specific cases. Nothing in our constitutional tradition suggests that exemptions are facially invalid.

Second, Ohio has indicated its intention to argue that the Establishment Clause affirmatively prevents Congress from interfering with state establishments of religion. This argument has been labeled, or mislabeled, the "federalism" interpretation of the Establishment Clause. It is subject to the originalist objection already discussed. The exemptions are not an establishment, and Ohio does not claim that its refusal of exemptions is part of a policy to establish some other religion. Congress is simply not interfering with an establishment of religion.

Moreover, the claim that the Establishment Clause prohibits Congressional interference with state establishments is not true. In some versions, this claim would require overruling or rewriting every Establishment Clause decision in the history of this Court. It is based partly on an interpretation of "respecting" that was never mentioned in the founding era. It would implausibly make the Establishment Clause a protection for the lingering establishments in Massachusetts and Connecticut, which expressed no interest in the First Amendment and failed to ratify it. The argument relies on eighteenth-century disagreements about establishment at the state level, ignoring the far more relevant consensus about establishment at the federal level. It ignores the rapid move to consensus on disestablishment in the early nineteenth century, and Republican disapproval of southern establishment of pro-slavery versions of Christianity, culminating in incorporation of the individual-liberty understanding of the Establishment Clause in the Fourteenth Amendment.

There is a version of the argument that tries to avoid all these problems by claiming that Congress simply has no power to do anything affecting religion. This argument is incoherent; it forbids Congress either to include or exclude

religion in legislation. It abandons any link to constitutional text; it is inconsistent with two centuries of Congressional practice; and it would invalidate many existing statutes.

ARGUMENT

I. In the Original Understanding, Regulatory Exemptions for Religious Conduct Raised No Issue Under the Establishment Clause.

Ohio's Establishment Clause arguments come in many variations. But the core idea at the heart of all those arguments is that government can establish a religion by failing to regulate it. Exemptions from government regulation are said to establish the unregulated religion.

There is no significant originalist support for this core idea. Exemptions from regulation were no part of the establishment of religion known to the founding generation, and when exemptions emerged as an outgrowth of the state-by-state process of disestablishment, no one attacked them as an establishment.

A. Exemptions Were No Part of the Practices Associated with Establishment of Religion.

The essence of establishment was government sponsorship and control of a single church or, in later years, of a group of churches, such as all Protestants or all Christians. In Judge McConnell's comprehensive survey of establishment in England and the colonies, he identifies six historic "Elements of the Establishment:"[4]

1) governmental control over the doctrines, structure, and personnel of the state church;

2) mandatory attendance at religious worship services in the state church;

3) public financial support;

[4] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003).

4) prohibition of religious worship in other denominations;

5) use of the state church for civil functions; and

6) limitation of political participation to members of the state church.[5]

This careful listing of six distinct elements is organizationally helpful, but of course each of these elements is familiar from other descriptions of the established churches.[6]

Each of these historic elements of the establishment has its counterpart in modern doctrine. Government is not permitted to control the doctrines, structure, or personnel of religious organizations.[7] Mandatory attendance at worship services is unconstitutional, even when judicial deference is at its maximum;[8] the contested modern counterpart to mandatory worship is prayer and other religious observances at government-sponsored events that people attend for secular reasons.[9] Public financial support of religious worship is unconstitutional (save for generally available public services, which may include such occasional services as disaster relief); the question whether public financial support of religious schools is sufficiently analogous to be an establishment is a major and contested issue.[10] Prohibition of worship by

[5] *Id.* at 2131-81.

[6] *See, e.g.*, Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 1-77 (Oxford Univ. Press 1986).

[7] *See, e.g., Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

[8] *See Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (invalidating compulsory worship at military academies).

[9] *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

[10] *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

minority faiths, which in modern times is rarely part of any effort to establish some other religion, is now treated as a free exercise issue.[11] The state cannot delegate government functions to churches or synagogues,[12] although it can contract for performance of specific services with religious and secular organizations alike.[13] The state cannot restrict political participation on the basis of religious convictions or religious participation.[14] Even the modern controversy over government endorsement of religious beliefs is analogized, by critics of such endorsements, to government designating the church or group of churches to be established.[15]

Exemptions from regulation do not appear on Judge McConnell's list or in any other description of the established church. The established church had no need of exemptions, because government rarely made laws that prevented members of the established church from practicing their religion. Laws regulating conduct were generally consistent with the moral commitments of the established church, both because the established church and its members had substantial political influence, and because government's control over the established church, generally including the power to appoint clergy, tended to prevent the emergence of religious teachings that challenged government policy.

Even a nonestablished church has no need for exemptions where its members have political control. Thus in Pennsylvania, there was no exemption from military service or

[11] *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 472 U.S. 874 (1990).

[12] *See, e.g., Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

[13] *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

[14] *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978).

[15] *See* Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. U.L. Rev. 37, 41-48 (1991).

oath taking so long as the Quakers were politically dominant. Instead, the laws did not require military service or oath taking of anyone. Pennsylvania had no organized militia until 1755, and then participation was voluntary.[16] Exemptions were enacted only after pacifists lost control and the new majority enacted conscription.[17] Then the Quakers, as a minority faith even in Pennsylvania, needed exemptions. And within the limits described in the next section, these exemptions were enacted.

B. Regulatory Exemptions Were an Outgrowth of *Dis*establishment.

Regulatory exemptions emerged when the majority became willing to provide for the religious liberty of minority faiths. Exemptions were never part of the establishment; they grew out of the long process of *dis*establishment.

Disestablishment did not happen all at once, but unfolded first in certain colonies and later state-by-state in the early republic. The formal designation of an established and tax-supported church was abandoned over a period of about sixty years, beginning in the 1770s and ending in 1833.[18] But this was just one stage in a longer process; the multiple elements of the classic establishment were abandoned one-by-one over a period of centuries. As early as 1675, Connecticut exempted Quakers from attending the established worship -- provided they did not assemble themselves. Curry, *supra* note

[16] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1468 (1990); R.R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 413 (1952); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & Religion 367, 385-86 (1994).

[17] *See* West, *supra* note 16, at 388-89.

[18] *See* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1432-48, 1457-1540 (reviewing disestablishment state by state).

6, at 25. In 1689, the Act of Toleration permitted dissenting Protestants to worship in England, Esbeck, *supra* note 18, at 1413-14, and this reform spread slowly and unevenly through the colonies.[19]

Once a state decided that minority faiths should be permitted to freely worship, the logic of toleration suggested that they should also be exempted from other laws that made their lives unnecessarily difficult. Some legislators may have viewed this as a right and others as a matter of legislative grace, but either way, regulatory exemptions emerged in the wake of toleration of dissenting worship. The first exemption for conscientious objectors to military conscription was enacted in 1673, in famously tolerant Rhode Island, which never had an established church. *See* Russell, *supra* note 16, at 412-13. The first exemption from oath taking appeared early in the Carolina colony, chartered in 1663, which from the beginning recruited settlers by advertising "full and free Liberty of Conscience." Curry, *supra* note 6, at 56. As toleration spread through the eighteenth century, the exemption from oath taking became nearly universal.[20] Some state legislatures enacted exemptions from the requirement of removing hats in court. McConnell, *supra* note 16, at 1471-72. Rhode Island exempted Jews from incest laws with respect to marriages "within the degrees of affinity or consanguinity allowed by their religion." *Id.* at 1471 & n.315

Exemption from military service was of course the most controversial claim to exemption. *See generally* West, *supra* note 16. This exemption is necessary to relieve an egregious burden on one of the most deeply held obligations of

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[19] *See id.* at 1475-76, 1485-87, 1537; McConnell, *supra* note 4, at 2161-69.

[20] *See* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1630-32 (1989) (collecting provisions from state and federal constitutions). There were also statutory provisions, as in the North Carolina provision described in text.

conscience, but it also confers a large secular benefit, relieving those exempted from important duties that can be dangerous, unpleasant, and difficult. Most colonies, and later most states, responded to this difficulty with a compromise: Quakers and similar conscientious objectors were exempt from military service in person, but were required to serve as noncombatants, provide a substitute, or pay a commutation fee.[21]

Another common set of exemptions, more connected to the process of disestablishment, was exemption from paying taxes to support the established church. Beginning early in the eighteenth century, exemptions from church taxes spread through the colonies that collected such taxes.[22] The famous general assessment proposal in Virginia, in 1785, was a last attempt to preserve financial support for churches by including all Christian denominations in the benefits and by universalizing the exemption -- any taxpayer could support either the church of his choice or a fund for schools.[23] But on this issue, exemptions and multiple establishments were only a stopgap. By 1833, the last state system of tax support for churches was repealed in Massachusetts,[24] and exemptions from the church tax were no longer an issue.

C. No One In the Founding Era Attacked Regulatory Exemptions as Establishments.

Legislatively enacted exemptions for religious practice were thus common by the time of the First Amendment.

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[21] *See id.* at 1632-33; McConnell, *supra* note 16, at 1468-69; Russell, *supra* note 16, at 414; West, *supra* note 16, at 389.

[22] *See* Esbeck, *supra* note 18, at 1434-36, 1440-47, 1476-77, 1479, 1489-91, 1498, 1508 n.431; 1512; McConnell, *supra* note 16, at 1469.

[23] The Virginia bill is reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 72-74 (1947) (Supp. App. to Rutledge, J., dissenting). For analysis, *see* Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787*, at 108-09 (Univ. Press of Virginia 1977).

[24] *See* Esbeck *supra* note 18, at 1448, 1524; 1 Anson Phelps Stokes, *Church and State in the United States* 426-27 (Harper 1950).

There is of course a large originalist debate about whether this practice of exemptions was embedded in the Free Exercise Clause.[25] But there is no originalist debate about the point at issue here. The founding generation was familiar with legislatively enacted exemptions for religious practice, and the states were busily engaged in disestablishing churches, but we have no record of anyone arguing that legislatively enacted exemptions were an establishment.

Opponents of exemption from military service argued that exemption was bad policy, but not that exemptions were unconstitutional or that they implicated any concern about establishment of religion. In the First Congress, the Select Committee proposed to include, in what became our Second Amendment, a clause providing that "no person religiously scrupulous shall be compelled to bear arms." 1 *Annals of Cong.* 778 (Gales & Seaton, Aug. 17, 1789). The opponents made a variety of arguments in the Committee of the Whole. Elbridge Gerry feared that government would "declare who are those religiously scrupulous, and prevent them from bearing arms." *Id.* In this way, government might "destroy the militia, in order to raise an army upon their ruins." *Id.* This objection seems so implausible as to suggest a willingness to argue just about anything in support of a reflexive opposition. But he did not argue that the proposed exemption would establish religion; that argument was apparently too implausible and unfamiliar to occur to him.

Mr. Jackson thought the amendment "unjust," unless those exempted were required to pay an equivalent. *Id.* at 779. Mr. Smith thought those exempted should find a substitute. *Id.* Mr. Sherman and Mr. Vining supported the amendment as proposed. *Id.* Mr. Stone thought the text should clarify "what the words `religiously scrupulous' had reference to." *Id.* Mr. Benson moved to strike the whole clause and leave the issue to the legislature. *Id.* "I have no reason to believe but the

[25] *Compare City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); *with id.* at 537-44 (Scalia, J., concurring).

Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion." *Id.* at 780. His motion was defeated, 24-22. *Id.*

Three days later, on the floor of the House, Mr. Scott also argued that this exemption should be left to the legislature. "I conceive it, said he, to be a legislative right altogether. There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords." *Id.* at 796 (Aug. 20, 1789). Mr. Boudinot supported the amendment. *Id.* The proposal was amended to read that "no person religiously scrupulous shall be compelled to bear arms *in person*" (emphasis added), and as amended, passed by the requisite two-thirds vote. *Id.* The clause was later removed in the Senate,[26] where debate was not recorded.

This debate reveals opponents who wanted a more limited exemption, requiring payment of a fee or provision of a substitute. These opponents prevailed in the House, by the addition of the words "in person." The debate reveals other opponents who wanted the whole issue left to legislatures, and these opponents appear to have prevailed in the Senate. But the debate contains no suggestion that legislative exemptions were in any way suspect. There is no hint in this debate of any issue concerning establishment of religion.

There was similar debate in Pennsylvania, where the legislature offered exemptions conditioned on noncombatant service or a fine of twenty shillings, and Quakers demanded an unconditional exemption. This dispute provoked a long political battle, which the Quakers eventually lost. Opponents of an unconditional exemption submitted petitions making a variety of arguments: that pacifism was a false religion, that "justice and equity" required service from all, that refusal to

[26] *See* 1 *Documentary History of the First Federal Congress of the United States of America* 136, 154 (Linda Grant de Pauw, ed., Johns Hopkins Univ. Press 1972).

serve in time of war struck at "the very Existence of Civil Government," that the religious liberty guarantee in Pennsylvania's charter did not include exemption from military service, that Quakers had paid taxes for military measures elsewhere in the British Empire. Counsel does not have access to the full text of these petitions, but in extensive summaries and quotations by a vigorous opponent of regulatory exemptions, there is no mention of a claim that unconditional exemption for Quakers would establish their religion. *See* West, *supra* note 16, at 390-91. And of course, Pennsylvania did exempt Quakers from serving in person.

Other exemptions did not leave a record of similar debate. Exemptions from oath taking were not controversial. Curry, *supra* note 6, at 81. With respect to the exemptions from paying taxes for the established church, the focus of debate was on whether the tax should be continued at all, whether members of minority faiths should have to pay taxes to their own church, and whether the exemptions were fairly administered.[27] No one appears to have thought that exemptions made things worse, or that exemptions established a religion. The question was whether exemptions were enough.

The record is similar in the reported cases from the early national era. Some lawyers argued against exemptions, and some judges ruled against exemptions, but no lawyer or judge appears to have argued that exemptions might establish a religion. John Gibson, Chief Justice of Pennsylvania, whose opinions are commonly cited as early rejections of any claim to a constitutional right to regulatory exemptions, said clearly that such exemptions could be allowed by legislators, or even by judges in cases properly within judicial discretion. In *Philips v. Gratz*, 2 Pen. & W. 412 (Pa. 1831), a Jewish plaintiff sought a continuance when his case was called for

[27] *See* Curry, *supra* note 6, at 162-92; Esbeck, *supra* note 18, at 1434-36, 1440-47.

trial on Saturday. The motion was denied, the case was tried, and plaintiff appealed. Chief Justice Gibson wrote:

> The religious scruples of persons concerned with the administration of justice will receive all the indulgence that is compatible with the business of government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath. But when a continuance for conscience' sake is claimed as a right, and at the expense of a term's delay, the matter assumes a different aspect.

Id. at 416. Similarly, in criticizing a decision protecting the confidentiality of a Catholic confession, he said he supported "the policy of protecting the secrets of auricular confession. But considerations of policy address themselves with propriety to the legislature, and not to a magistrate . . ." *Id.* at 417. He thus held that the state constitution did not *require* exemption, but he was equally clear in his view that it did not *prohibit* exemption.

Counsel for the defendant, arguing against the exemption, did not claim otherwise. They urged that an exemption would be unworkable, and that the constitutional guarantee of religious liberty was confined to "faith and religious worship" and did not affect "performance of a civil duty." *Id.* at 415. But they did not suggest that an exemption would establish anyone's religion. Similarly in other cases, to the extent we have either an opinion of the court or argument of counsel opposing a claimed exemption, we find a variety of arguments but no suggestion that the legislature could not provide exemptions or that such legislative exemptions would establish a religion.[28]

In the modern debate over whether regulatory exemptions are required, historically minded opponents of exemptions have argued that they were not required by the

[28] *See Commonwealth v. Drake*, 15 Mass. 161 (1818); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1815).

original understanding. But none of those scholars has argued that regulatory exemptions were forbidden by the original understanding, and none has cited a single instance of anyone in the founding generation arguing that regulatory exemptions were unconstitutional. Rather, their position is that exemptions were commonly granted but were thought to be a matter of legislative grace. Ellis West acknowledges that "exemptions from conscription laws were often granted to religious conscientious objectors before, during, and after the Revolution;" he attributes this to legislative "sympathy." West, *supra* note 16, at 375. Philip Hamburger argues: "[T]hat various state statutes (or even constitutions) expressly granted religious exemptions from military service or other specified civil obligations hardly suggests that such exemptions were rights under the United States Constitution."[29] Gerard Bradley makes an impassioned conceptual and originalist case against regulatory exemptions under the Free Exercise Clause, but insists that "Nothing in this idea (and nothing in the Constitution) prohibits relief from neutral, generally applicable laws for conscientious objectors *by legislative accommodation*."[30]

The only historically minded scholar who has in any way attempted to link regulatory exemptions to establishment is Philip Hamburger. He notes that religious dissenters attacking the privileges of the established church often argued for equal rights for all faiths. Hamburger, *supra* note 29, at 946. Then he claims that this equal-rights argument "had implications for exemption," because exemptions "could create unequal rights." *Id.* at 946-47. But this is Hamburger talking, not anyone from the eighteenth century. He has few examples of anyone attacking exemptions on these grounds --

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[29] Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 948 (1992).

[30] Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 262 (1991).

none that do so unambiguously and none that connect such an attack to an establishment of religion. Just as legislators could grant exemptions and support them on policy grounds without believing they were constitutionally required -- Hamburger's principal point -- so critics could oppose exemptions on policy grounds without believing they were constitutionally prohibited.

The few examples of eighteenth-century views in Hamburger's footnotes to this section do not support his effort to link exemptions with establishment. He quotes a 1777 Memorial of Virginia Presbyterians stating that "the concerns of religion, are beyond the limits of civil control," and that accordingly, the church should not "receive any emoluments from any human establishments for the support of the gospel." *Id.* at 946 n.117. "Emoluments" is clearly a reference to financial support, not regulatory exemptions. Hamburger also quotes the Baptist leader John Leland as the only pastor of the time to criticize the exemption of the *clergy* from taxation and military service. *Id.* at 947 n.119. But these exemptions were based on religious status, not on any religious belief that prevented compliance with the law. As Justice O'Connor has explained, this fundamental distinction helps reconcile exemptions with a strong principle of religious equality:

> What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discrimination based on sect.

Board of Education v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

This distinction was not explicitly developed in the eighteenth century, but it seems to have been implicit,

reconciling the rhetoric of equal rights with the practice of exemptions. This implicit distinction explains why the religious minorities that demanded equal rights for all faiths did not oppose regulatory exemptions on that ground, and why John Leland attacked privileges for the clergy as such but never attacked exemptions for conscientious objectors. Indeed, Hamburger elsewhere acknowledges that proponents of religious liberty often clarified broad rhetoric about equal rights and no laws taking cognizance of religion, insisting that government must also protect free exercise.[31]

There were nearly four million Americans alive in the 1780s. Somewhere, sometime, someone might have said something connecting regulatory exemptions with establishment. Such a quote might surface. But it is clear that such views were no significant part of the founding-era debate on religious liberty.

II. This Original Understanding Helps Explain and Confirm the Long Practice of Regulatory Exemptions and the Decisions Upholding Them.

This original understanding helps explain and confirm both American practice and Supreme Court precedent. From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions. A scholar using a Lexis search and sampling techniques estimated that there were 2000 religious exemptions on state and federal statute books in 1992.[32]

The case law is developed by Petitioners and other amici. We will not elaborate it here, except to note this

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[31] Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 Sup. Ct. Rev. 295, 344-45.

[32] James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 & n.215 (1992). His search method appears to have included tax exemptions as well as regulatory exemptions.

Court's repeated unanimity on the general view that regulatory exemptions are at least constitutionally permitted.[33] Of course there are limits to this rule. A tax exemption was invalidated because there was no burden on religious practice to be relieved and the cost of the exemption burdened other taxpayers,[34] or because it involved a content-discriminatory tax on the press.[35] Regulatory exemptions are invalid if they are "absolute" and "take[] no account" of burdens on others in particular applications,[36] or if they are confined to a single sect or a single religious practice.[37] But nothing in these cases supports Ohio's claim that regulatory exemptions are facially invalid and that the prison provisions of RLUIPA are unconstitutional in all their applications.

The argument that regulatory exemptions implicate the Establishment Clause is relatively new. It grows from misapplication of broad language seeking to summarize the principles of disestablishment and free exercise. But if ripped from context and historical roots, such broad language can suggest results inconsistent with those principles. The validity of regulatory exemptions has perhaps not been explained in sufficient depth because the tradition of such exemptions has

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[33] *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 705-06 (1994); *id.* at 711-12 (Stevens, J., concurring); *id.* at 715-16 (O'Connor, J., concurring); *id.* at 722-27 (Kennedy, J., concurring); *id.* at 743-45 (Scalia, J., dissenting); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); *id.* at 892-903 (O'Connor, J., concurring); *Tex. Monthly v. Bullock*, 489 U.S. 1, 18-19 n.8 (plurality opinion) (1989); *id.* at 28 (Blackmun, J., concurring); *id.* at 38-40 (Scalia, J., dissenting); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-39 (1987); *id.* at 341-46 (Brennan, J., concurring); *id.* at 346 (Blackmun, J., concurring); *id.* at 348-49 (O'Connor, J., concurring).

[34] *Tex. Monthly*, 489 U.S. at 19 n.8 (plurality opinion).

[35] *Id.* at 25-26 (White, J., concurring); *id.* at 28 (Blackmun, J., concurring).

[36] *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985).

[37] *See Grumet*, 512 U.S. at 702-05; *Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).

been so long and so strong and their validity seemed so obvious to so many.

As understood by those in the founding generation who labored in the states on behalf of disestablishment, there was a material difference between support for organized religion (establishment, and a threat to religious liberty) and exemption for religious practice (liberty enhancing, whether or not required by free exercise). Exemptions are not a way of expanding the power of the dominant religion; they are a way of protecting religions that lack the political power to prevent legislation imposing substantial burdens on their religious practice. Government support makes a religion better off than it would have been if government had done nothing; regulatory exemptions relieve burdens imposed by government and leave the religion's adherents no better off than if government had not imposed the burden in the first place. Government does not establish a religion by leaving it alone.

Exemptions reduce social and political conflict and facilitate legislative compromise. If a proposed law conflicts with the religious obligations of a minority religion, the legislature may override the religious objection and enact the law for everybody; it may fail to enact the law at all; or it may enact the law and exempt those whose religious commitments conflict with the law. If the third option were constitutionally impossible, the choice between the first two options would force all out political warfare between the threatened religious minorities and the interest groups supporting the proposed law. A rule that legislatures cannot exempt burdened religious minorities can only exacerbate social conflict.

Exemptions are substantively neutral.[38] Exemptions remove burdens that discourage or penalize believers attempting to practice their faith, and properly administered, they do not encourage others to adopt the religious practice. Religious practices are often burdensome or meaningless to

[38] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561-63 (1993) (Souter, J., concurring).

nonbelievers; their meaning comes from religious faith. One does not adopt a kosher diet, or strictly observe the Sabbath, merely because it is permitted. Government permission matters only to those who are religiously motivated.

Occasionally religious faith coincides with secular self-interest, as in the case of exemptions from military service. In those cases, the exemption must be carefully structured to avoid encouraging or pressuring nonbelievers either to genuinely adopt or falsely claim the religious belief that would entitle them to exemption. In some cases, the most nearly neutral solution will be to deny the exemption. If a prisoner claimed a religious need to be out of his cell with freedom to roam the prison grounds, that claim would be denied not only because of the compelling interest in prison security, not only because the claim is almost certainly insincere, but also because such an attractive benefit would pressure other prisoners to join the new religion. It may be that in the confined world of prisons, where all freedoms and benefits depend on the will of prison authorities, such cases of inducement to nonbelievers will arise more often than in the free world. But the problem of religious claims that coincide with secular self-interest, like Ohio's other claims of problematic applications, must be addressed as they arise in real cases. Problems in specific applications do not come close to facially invalidating the historic practice of regulatory exemptions.

III. Federalism Interpretations of the Establishment Clause Do Not Invalidate RLUIPA.

In recent years there has a emerged a variety of arguments to the effect that the Establishment Clause was, in whole or in part, a provision to protect the surviving state establishments against federal interference. Ohio made no such argument below, but it says that it intends to make such an argument now. Br. in Response to Pet. for Cert. 11.

The Establishment Clause did not originally apply to the states, and choices concerning the establishment of religion at the state level were therefore left to each state. This is the important federalism point, but it was true of all provisions in the Bill of Rights. States could establish a church, but they were could also prohibit the free exercise of religion or take property without just compensation.[39]

The new "federalism" interpretations of the Establishment Clause make a much more ambitious and dubious claim. They assert not just that the Establishment Clause did not prohibit state establishments, but also that the Clause affirmatively protected state establishments, forbidding Congress to interfere with any surviving state establishment. Some versions of this argument suggest that the Establishment Clause *only* prohibits federal interference with state establishments, and that it creates no individual rights.[40] That interpretation would require that every Establishment Clause decision of this Court be overruled or rewritten on a new theory. It would leave both states and the federal government free to establish churches, and it would leave individuals with no remedy. Virginia has tried to avoid this problem by suggesting that the Establishment Clause protects individuals against establishments *and* prohibits federal interference with state establishments. Pet. for Writ of Certiorari, *Bass v. Madison* 12 (No. 03-1404). These new interpretations of the Establishment Clause are both unfounded and inapplicable to RLUIPA.

A. RLUIPA Is Not "a Law Respecting [Ohio's] Establishment of Religion."

Assuming that the Establishment Clause prohibits federal interference with state establishments, and assuming

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[39] *See Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589 (1845); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

[40] *See* Steven D. Smith, *Foreordained Failure* 17-54 (Oxford Univ. Press 1995).

that this meaning of the Clause survived ratification of the Fourteenth Amendment, none of this would cure the fundamental problem with Ohio's argument: regulatory exemptions are not a "law respecting the establishment of religion." As already explained, regulatory exemptions were never part of the establishment of religion, and requiring exemptions has no tendency to create an establishment.

Nor does RLUIPA interfere with any state establishment. Ohio does not claim, and could not claim, that its refusal to grant exemptions is part of a policy to establish some other religion. Ohio defends its refusal of exemptions on the secular ground that exemptions are burdensome to prison administration. It does not claim that its refusal of exemptions moves in any way, to even a slight extent, towards an establishment of religion. Nor does the grant of exemptions move toward establishment, because exemptions were no part of the establishment of religion.

B. The Text Does Not Support the Federalism Interpretation of the Establishment Clause.

The Establishment Clause provides that Congress shall make "no law *respecting* an establishment of religion" (emphasis added). "Respecting" means relating to or concerning. In 1789, there was no federal establishment, so at the federal level, the only imaginable laws relating to an establishment of religion would have been laws creating an establishment, or beginning to do so. This Court has therefore said that "a given law might not *establish* a state religion but nevertheless be one `respecting' that end in the sense of being a step that could lead to such establishment . . . ." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

But another meaning is also possible. A federal law interfering with a state establishment of religion would relate to that state establishment, and thus literally be "a law respecting [the state's] establishment of religion." This is the textual basis for the argument that the Establishment Clause prohibits federal interference with state establishments.

This meaning is linguistically possible, but there is no evidence that anyone intended it or even noticed the possibility. "[R]especting" was inserted by the conference committee without recorded explanation. 3 *Documentary History*, *supra* note 26, at 228. No one at the time mentioned any possible federalism meaning of "respecting." The brief recorded debate in the House reflected popular fear that the federal government might establish one or more national religions, 1 *Annals of Cong.* 758 (Aug. 15, 1789), but no fear that Congress might interfere with what remained of the state establishments.

Massachusetts, Connecticut, and New Hampshire (and Vermont, which would become a state in 1791), maintained tax supported churches, with each town choosing which church to support, and with exemptions permitting dissenters to pay their tax to their own church instead -- at least in theory, and sometimes in practice. *See* Curry, *supra* note 6, at 134-92. In the House debate on the Establishment Clause, Mr. Huntington of Connecticut feared that the Clause might lead federal *courts* to dismiss suits to collect Connecticut's mandatory "contributions" to churches. 1 *Annals of Cong.* 758 (Aug. 15, 1789). But this line of thought did not lead him or anyone else to worry that *Congress* might interfere with the New England establishments. No one else mentioned the New England systems, and no one argued for or against any federalism implications of the proposed amendment. The debate concerned the substance of what should be prohibited to the federal government.[41] None of the state proposals for amendments had raised any concern about federal interference with state establishments. Massachusetts and Connecticut refused to ratify the First Amendment.[42] Yet we are supposed

[41] 1 *Annals of Cong.* at 757-59. For analysis, *see* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 908 (1986).

[42] *See* Thomas J. Curry, *Farewell to Christendom* 42, 129 n.27 (Oxford Univ. Press 2001).

to believe that the Establishment Clause was drafted principally for their benefit and at the request of their representatives.

Many supporters of the New England systems denied that they maintained an establishment at all. Curry, *supra* note 6, at 172, 174-75, 189. It was mostly Baptists who charged New England with establishment, but there were no Baptists in Congress. *Id.* at 205. The Congregationalists who represented New England would at least have found it embarrassing to refer to their systems as "an establishment," and they might well have viewed it as ineffectual to try to protect those systems by forbidding federal interference with "an establishment."

A principal reason for the lack of alarm about federal interference with state establishments is that it is hard to imagine how Congress could have done such a thing.[43] Congress had no delegated power to enforce constitutional rights or individual liberties in the states; that would require a Civil War and the Reconstruction Amendments. The transportation and communication revolutions still lay in the future; any connection between locally assessed church taxes and interstate commerce would have been highly attenuated. The Spending Clause was available, but the Sixteenth Amendment was 125 years in the future; Congress had little money to spend. Surely no one contemplated taxing people in all the states to pay New England to abandon what was left of its establishment. Of course Anti-Federalists sometimes imagined the new federal government exceeding its powers and doing quite implausible things. But the delegations from the three states with tax supported churches were mostly Federalist supporters of the Constitution,[44] not disposed to such imaginings.

[43] *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 NYU L. Rev. 346, 408 (2002).

[44] For biographies of these delegations, see 14 *Documentary History*, *supra* note 26, at 489-525, 604-69.

In sum, a ban on federal interference with state establishments is a possible meaning of the text. But there is no reason to believe it was an intended meaning of the text, and much reason to believe it was not intended or even considered. In the context of the formation of a new government with no hint of an established religion, the more straightforward meaning of "respecting" is the one adopted by this Court -- the federal government was not to take any step towards an establishment.

C. The Original Understanding Does Not Support the Federalism Interpretation of the Establishment Clause.

Some who claim that the Establishment Clause was only about federalism make an original understanding argument. The claim is that the First Congress could not have agreed on either the desirability or the meaning of disestablishment. Smith, *supra* note 40, at 21. Hence the Establishment Clause could not create any substantive right to be free of establishments. It could only leave the question to the states.

But of course, the Founders did not have to agree on disestablishment. They had to agree only on what powers they were denying to the federal government -- and they had to agree on that only at a high level of generality. Opponents of all establishments could obviously support a ban on federal establishments. Those who supported state establishments might be less enthused about the sweep of the federal clause.[45] But despite such arguments at the margins of the Clause, supporters of state establishments had ample reason to oppose a federal establishment. No one in New England could

[45] Huntington's comments about not "patroniz[ing] those who profess no religion at all" suggest this concern, 1 *Annals of Cong.* 758 (Aug. 15, 1789), as does the apparent effort in the Senate to expressly confine the Clause to denominational preferences. *See Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring) (reviewing the drafting history).

plausibly want a federally established church competing with, or layered on top of, their state establishments. Nor could anyone in New England plausibly want an established church designated by Congress, where Congregationalists were not likely to predominate. The three states with tax supported Congregationalist churches in 1789 had only 16 of the 65 seats in the First Congress. U.S. Const., art. I, §3. Members did not have to resolve their disagreements about state establishments, and there was no significant disagreement about a federal establishment.

The political demand for the Establishment Clause did not come from supporters of the surviving establishments in New England, but rather from the dissenting churches who were successfully pursuing disestablishment in the states.[46] These dissenters had no interest in protecting the remains of New England's establishment. Their interest in the Establishment Clause was to be sure that establishment never got a foothold in the new federal government. This Court's interpretation of "respecting" is entirely consistent with their political goals.

D. Any Protection for State Establishments Has Been Superseded.

The campaign against establishments in the states continued after 1791. No new American state or territory formally established any religion, and all the New England states ended their tax support for churches by 1833. State courts largely disentangled the law from religious explanations.[47] Protestants came to oppose financial aid to "sectarian" schools on grounds of separation of church and

[46] *See* Douglas Laycock, *Religious Liberty as Liberty*, 9 J. Contemp. Legal Issues 313, 343-46 (1996).

[47] Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085, 1100-18 (1995).

state.[48] Some of the new state and territorial constitutions borrowed the language of the federal Establishment Clause,[49] obviously taking that language to mean a prohibition of establishments and not something about federal interference with states. By the time of the Fourteenth Amendment, the consensus against establishment of religion was nearly universal, leaving only disagreements about the boundaries of that principal.

No southern state had a formal establishment of a *church* in the nineteenth century, but they all effectively established a particular religious *teaching*. Lash, *supra* note 47, at 1136-41. They supported a pro-slavery version of Christianity and vigorously suppressed any contrary teaching. They narrowly restricted and closely monitored religion among the slaves, especially emphasizing Paul's teaching that "slaves be subject to your masters." *Id.* at 1138 n.235. Republicans charged the South with violating both Religion Clauses, and listed both among the rights to be incorporated. *Id.* at 1141-45. The Republican objection was not to federal interference with state establishments, but rather to state support for a religious teaching and state suppression of competing religious teachings. Incorporation of a ban on state establishment of religion is thus entirely plausible. Congress was given express power to enforce this ban on state establishments by appropriate legislation. U.S. Const., amend. XIV, §5. If once there had been a proscription on federal interference with state establishments, that proscription is inconsistent with the Fourteenth Amendment, and necessarily repealed.

Two of the most prominent scholars who defend a federalism understanding of the Establishment Clause in 1789 come to essentially this conclusion, although they avoid the word "repealed." Kurt Lash says the Establishment Clause was gradually reinterpreted to protect "freedom of

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[48] *See id.* at 1118-25; Douglas Laycock, *The Many Meanings of Separation*, 70 U. Chi. L. Rev. 1667, 1678-81 (2003).

[49] Akhil Amar, *The Bill of Rights* 259 (Yale Univ. Press 1998).

conscience," so that by 1868 it "was understood to be a liberty as fully capable of incorporation as any other." Lash, *supra* note 47, at 1154. Akhil Amar says that modern nonestablishment principles are part of the Fourteenth Amendment either through direct incorporation or as part of the rights to free exercise, equal protection, and equal citizenship. Amar, *supra* note 49, at 252-54.

These scholars see the Establishment Clause transformed by the Fourteenth Amendment. For those who believe the Establishment Clause was an individual liberty provision from the beginning, no great transformation is required. Either way, the conclusion is the same. At least since the Fourteenth Amendment, the Establishment Clause has protected individual liberty against state laws respecting an establishment of religion. Whether or not it ever protected state establishments from Congress, it does not do so now.

E. There Is No Basis for Virginia's Argument That Congress Is Barred from Taking Any Action Affecting Religion.

Virginia has tried to escape all these problems by offering a new version of the federalism argument. Virginia claims that Congress is wholly forbidden to act on the subject of religion. Cert. Pet. 12, in *Bass v. Madison* (No. 03-1404). Congress cannot violate the Establishment Clause, it cannot violate the Free Exercise Clause, *and* it cannot enact any other legislation concerning religion, even if it violates neither Clause.

This remarkable argument abandons any link to the constitutional text. Indeed, Virginia implies that Congress is most disabled precisely in the "play in the joints" where this Court says a law violates neither of the two Religion Clauses. *Id.* at 14. This argument is apparently designed to avoid the fact that regulatory exemptions have nothing to do with establishment. Exemptions have something to do with religion, and thus Virginia says, Congress cannot enact them.

For this argument to apply to RLUIPA, it must apply even to the Spending Clause. Virginia necessarily claims not merely that Congress cannot *mandate* religious exemptions in the states, but also that it cannot *encourage* religious exemptions by offering money to states that provide them.

The First Congress rejected the only draft amendment that might have given this interpretation some plausibility. Samuel Livermore of New Hampshire moved for the Clause to read: "Congress shall make no laws *touching religion*, or infringing the rights of conscience." 1 *Annals of Cong.* 759 (Aug. 15, 1789) (emphasis added). The Committee of the Whole briefly adopted Livermore's proposal, *id.*, but the House soon replaced it with a substitute. *Id.* at 796 (Aug. 20, 1789). The Amendment ultimately adopted does not prohibit laws touching or respecting "*religion*," but only laws respecting "*an establishment* of religion." This textual difference is precisely what Virginia seeks to elide. Justice Souter has accurately noted that "Livermore's proposal would have forbidden laws having anything to do with religion and was thus not only far broader than Madison's version, but broader even than the scope of the Establishment Clause as we now understand it," citing regulatory exemptions as an example that would have violated Livermore's proposal but does not violate the Establishment Clause.[50]

Virginia relies not on constitutional text, nor on specific explanations of that text, but rather on broad statements that the federal government had no power to meddle with religion. These statements were mostly shorthand for the real issue in dispute -- that Congress had no power to burden or interfere with religious liberty. Beyond that, such rhetoric is partly the familiar Federalist argument that a Bill of Rights was not needed, and partly a reflection of the much narrower scope of federal powers at the time. But it is not a basis for interpreting the First Amendment.

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[50] *Lee v. Weisman*, 505 U.S. 577, 612-13 (1992) (Souter, J., concurring).

Congress has never acted as though it were barred from any law touching religion -- not in the beginning and not now. Congress reenacted the Northwest Ordinance, with its provision guaranteeing religious liberty in the Northwest Territory.[51] Early Congresses paid churches to send teachers to Indian tribes.[52] Congress guaranteed "the free enjoyment of their . . . religion" to residents of the Louisiana Purchase.[53]

Even if Virginia's argument were confined to federal legislation affecting the states, its consequences would be vast. Congress could not include church-affiliated schools in federal programs to aid education. Nor, presumably, could Congress exclude such schools. Nor could Congress provide that if such schools participated, they could not use the funds for purely religious purposes.[54] Congress could not prohibit religious discrimination in employment by state and local governments.[55] Congress could not protect religious speech in the Equal Access Act,[56] and perhaps it could not protect any speech in any Act, because there are also founding-era statements that Congress lacked all power over speech. For example, James Madison said that "the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States."[57]

But there is more. The core of Virginia's argument is not that the Establishment Clause especially protects the states,

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[51] 1 Stat. 50 (1789). Within note (a) beginning at 51, see Article I at 52 for the religious liberty provision.

[52] *See* Robert L. Cord, *Separation of Church and State* 53-80, 261-70 (Lambeth Press 1982).

[53] Act of Oct. 31, 1803, ch. 1, §2, 2 Stat. 245.

[54] *But see Mitchell v. Helms*, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring) (relying on such a requirement).

[55] *See, e.g.*, 42 U.S.C. §2000e-2(a) (2000).

[56] *But see Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding the Act).

[57] James Madison, *Report on the Virginia Resolutions* (Jan. 18, 1800), reprinted in 5 *The Founders' Constitution* 141, 146 (Philip Kurland & Ralph Lerner, eds., Univ. of Chicago Press, 2d ed. 2000).

but that Congress lacks all power over religion. But if Congress lacks all power over religion, any legislation touching religion is invalid whether or not it also touches states. Congress could not prohibit religious discrimination in private employment, or even in federal employment. Congress could not exempt conscientious objectors from military service or from any other federal law. Congress could not enact tax exemptions for churches in the District of Columbia -- but neither, perhaps, could it tax them. The view that Congress simply cannot act with respect to religion is not even coherent.

The "federalism" theory of the Establishment Clause has recently been subjected to devastating reviews by law professor Noah Feldman, *supra* note 43, at 405-12, and historian Thomas Curry, *supra* note 42, at 41-44, 128-30 & nn.24-33. Curry concludes that the theory "belongs entirely to the world of logical distinctions and has no connection with the world of history." *Id.* at 129 n.28. More fundamentally:

> A majority of Americans came to believe that for government to withdraw from religious affairs would be good for both Church and State. To reduce this movement . . . to a scheme to protect the dying remnants of the petty tyrannical New England Church-State systems represents a lamentable loss of historical wisdom.

Id. at 43-44. This Court should not make the same mistake.

CONCLUSION

The judgment should be reversed.

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